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Paper 9
Entered: November 9, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LAM RESEARCH CORP.,
Petitioner,

v.

DANIEL L. FLAMM,
Patent Owner.

Case IPR2016-00466
Patent 5,711,849

Before DONNA M. PRAISS, CHRISTOPHER L. CRUMBLEY, and JO-ANNE M. KOKOSKI, *Administrative Patent Judges.*

KOKOSKI, *Administrative Patent Judge.*

DECISION
Denying Petitioner's Request for Rehearing
37 C.F.R. § 42.71(d)

On July 19, 2016, we issued a Decision Denying Institution (Paper 7, "Decision"), declining to institute an *inter partes* review of claims 1–29 of U.S. Patent No. 5,711,849 ("the '849 patent," Ex. 1001). On August 17, 2016, Lam Research Corp. ("Petitioner") filed a Request for Rehearing (Paper 8, "Req. Reh'g"), requesting modification of the Decision and institution of trial on all grounds raised in the Petition. Req. Reh'g 3.

A request for rehearing must identify specifically all matters the party believes we misapprehended or overlooked, and the place where each matter was addressed previously in a motion, an opposition, or a reply. 37 C.F.R. § 42.71(d). Petitioner, as the party challenging the Decision, has the burden of showing it should be modified. *Id.* When rehearing a decision on a petition, the Board will review the decision for an abuse of discretion. *See* 37 C.F.R. § 42.71(c). An abuse of discretion may be determined "if a decision is based on an erroneous interpretation of law, if a factual finding is not supported by substantial evidence, or if the decision represents an unreasonable judgment in weighing relevant factors." *Arnold Partnership v. Dudas*, 362 F.3d 1338, 1340 (Fed. Cir. 2004) (citing *In re Gartside*, 200 F.3d 1305, 1315–16 (Fed. Cir. 2000)).

Petitioner argues that the Decision is an abuse of discretion because it was based on an erroneous finding of fact regarding Battey[1] that was unsupported by substantial evidence. Req. Reh'g 4–14. In particular, Petitioner argues that "the Board's findings that 'Dr. Cecchi simply states that Battey's quantity *h* is the surface reaction rate constant divided by the

[1] Battey, *The Effects of Geometry on Diffusion Controlled Chemical Reaction Rates in a Plasma*, J. Electrochem. Soc.: Solid-State Science and Technology, Vol. 124, No. 3 (1977) 437–41 (Ex. 1005).

diffusivity, and does not expound upon the reasons' are unsupported by the substantial evidence." *Id.* at 3. According to Petitioner, "Dr. Cecchi's declaration points to specific and substantial objective evidence demonstrating this fact," in that it "cites and quotes explicit statements from Battey establishing that *h* is the ratio of the surface reaction rate constant and the diffusivity" and "undertakes an extended calculation that mathematically demonstrates" that Battey's surface reaction rate constant is the same as that claimed in the '849 patent. *Id.* at 5; *see id.* at 6–7.

Although Petitioner contends that the Petition addresses these arguments regarding Battey's quantity *h*, Petitioner does not state where it made these arguments in the Petition. *See* Req. Reh'g 6–13. That Petitioner only cites to Dr. Cecchi's declaration in support of its contentions suggests that the arguments are missing from the Petition. Per 37 C.F.R. § 42.71(d), Petitioner must point out where the matter was previously addressed in its Petition. We could not have overlooked argument or evidence that was not presented in the Petition.

Furthermore, the Request for Rehearing contains analysis not presented in Dr. Cecchi's declaration, including several pages spent mathematically deriving the relationship between Battey's quantity *h*, the surface reaction rate constant, and the diffusivity. Req. Reh'g 8–9. Indeed, Petitioner all but concedes that the analysis it now relies upon was not set forth in the declaration, asserting that "a reaction rate can be expressed as the product of a reaction rate constant, K_s, and a reactant concentration, v," a relationship allegedly "*implicit in the calculations undertaken in Dr. Cecchi's declaration*." *Id.* at 8 (emphasis added). A request for rehearing is not an opportunity to supplement a petition.

As set forth in the Decision, we were not persuaded, based on the evidence before us, that Petitioner established sufficiently that "Battey's description of quantity *h* teaches extracting a surface reaction rate constant from etching rate data determined from a relatively non-uniform etching profile." Dec. 9. The Decision provided an analysis of Battey and concluded that

> Dr. Cecchi does not provide sufficient explanations as to why a person having ordinary skill in the art would understand the disclosures in Battey to teach that quantity h is the ratio of the surface reaction rate constant to the diffusion coefficient, and that a surface reaction rate constant can be extracted therefrom.

Id. at 10. We fully considered the arguments and evidence presented in the Petition and deemed them insufficient to establish a reasonable likelihood that at least one of the challenged claims of the '849 patent is unpatentable. *Id.* at 7–14. Petitioner does not persuasively show in the Request for Rehearing that this conclusion is unsupported by substantial evidence. It is not an abuse of discretion to have made an analysis or conclusion with which a party disagrees.

Petitioner's Request for Rehearing is *denied*.

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